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In The

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., *ET AL.*,

Petitioners,

v.

GROKSTER, LTD., *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF BY *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF ISSUANCE OF WRIT OF CERTIORARI

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INTEREST AND IDENTITIES OF *AMICI CURIAE*

Amici curiae are law professors and intellectual property treatise authors.[1] They support issuance of the writ of certiorari in this case because of the critical public interests that are at risk as a result of disagreements among the federal appellate courts on important questions of copyright law and technology policy. Unless this Court resolves these differences, neither the authors of copyrighted works nor the developers of network technologies will be able reliably to predict their legal rights and duties in a networked world, and innovation in both the arts and technology will suffer.

Indeed, *amici* are so convinced that the Court *should* decide these issues that they have set aside their considerable differences about *how* the Court should decide them. This brief accordingly urges the Court to grant review, but it takes no position on what the outcome of that review should be.

The following identifies the *amici curiae* who have joined this brief:

Keith Aoki is the Philip H. Knight Professor at the University of Oregon School of Law where he teaches copyright law, cyberlaw, trademark and unfair competition law, and property. His research focuses on globalization and intellectual property in the area of plant genetic resources, biotechnology, and patent law.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to its preparation or submission. *See* S. Ct. R. 37.6. *Amici* understand that all parties have consented to the submission of this brief and that their letters of consent are on file with the Court. *See id.* R. 37.2(a).

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INTRODUCTION AND SUMMARY OF ARGUMENT

This is the story of two sets of innovators. One set consists of authors, artists, and their publishers, who rely on the consistent and predictable application of copyright law to provide an incentive to produce and disseminate valuable works of creative expression. The other set consists of digital pioneers who use network technology to connect us with one another in unprecedented and innovative ways. Both communities are important to cultural and industrial progress, and when they clash, innovation suffers in both the arts and technology.

Twenty years ago, this Court struck a careful balance between the interests of copyright owners and technologists in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Today, changes in information technology have overtaken the *Sony* standards, resulting in confusing and conflicting rulings in the federal appellate courts. The Ninth and Seventh Circuits are deeply divided on the application of secondary copyright liability to online ventures and the interpretation of *Sony* in a networked world. The immediate problem involves Internet

file-sharing, but if left unaddressed the circuit split could affect myriad existing technologies, undermine the copyright system, and retard future innovation in both communities.

This Court should therefore play the role that it has always played in this field by interpreting the law in light of new technological developments and establishing clear standards for secondary copyright infringement. Congress has traditionally regarded the courts as the steward of these important concerns. If the Court declines to issue the writ of certiorari here, the vital legal and technological interests at stake have little hope of meaningful resolution.

ARGUMENT

I. THE LACK OF UNIFORM STANDARDS FOR SECONDARY COPYRIGHT LIABILITY RETARDS INNOVATION IN BOTH THE ARTS AND TECHNOLOGY.

Copyright law gives authors control over their creative expression in order to serve the greater public interest. In doing so, the law strikes a careful balance. Too much private control over copying and dissemination of creative expression denies the public access to valuable goods and to the raw materials needed for further innovation. Too little control results in an insufficient impetus to produce the works in the first place.

Copyright's balance between private incentive and public benefit varies, however, depending on how information goods are packaged and disseminated. Indeed, the history of copyright law is a history of adjustments to new developments in information technology. In other words, copyright law has to strike a balance not only between private incentive and public benefit, but also between authorial innovation and technological innovation. If

copyright gives authors too much control over the technologies of reproduction and distribution, then technological innovation suffers. But if copyright turns a blind eye to the widespread and unregulated use of technologies that facilitate low-cost infringement, then authorial innovation suffers.

The importance of getting this balance right in today's world cannot be overstated. The copyright content industry and the information technology industry are vital parts of the U.S. economy. Copyrighted content represents twelve percent of gross domestic product – more than the total expenditures and investments of all state and local governments – and its companies employ over eight percent of all U.S. workers. Stephen E. Siwek, *Copyright Industries in the U.S. Economy* iii-v (2004). The information technology sector represents eight percent of gross domestic product, Econ. & Stat. Admin., U.S. Dep't of Commerce, *Digital Economy 2003* app. at 12 (2003), and accounts for more than twenty-five percent of the economy's growth over the last seven years, *id.* at 10. When these two vital interests clash, innovation and progress in both the aesthetic and technological communities is at risk.

In fact, the only thing worse than striking the wrong balance between these two important sets of innovators is not striking a balance at all, leaving them without a clear idea of the standards that govern their relationship. Twenty years ago, this Court provided such standards in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), which contemplated secondary copyright liability for the manufacturer of a "staple article of commerce" used in infringement unless the article was "capable of substantial noninfringing uses." *Id.* at 442 (involving the Betamax video recorder). Unfortunately, changes in information technology – particularly the increased digitization of copyrighted goods and the ubiquity of

network technologies – have overtaken the *Sony* standards, resulting in confusing and conflicting rulings in the federal appellate courts. *See infra* Parts II-III.

Unless the Supreme Court resolves this confusion, innovation in both the arts and technology is threatened. More than file sharing is at issue here, just as *Sony* decided the fate of more than just the Betamax. *See, e.g.*, *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 846-47 (11th Cir. 1990) (applying *Sony* to television signal descrambling devices); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 261-67 (5th Cir. 1988) (applying *Sony* to software that defeated anticopying protection); *A&M Records, Inc. v. Abdallah*, 948 F. Supp. 1449, 1456-57 (C.D. Cal. 1996) (applying *Sony* to "time-loaded cassettes"). A ruling by this Court would provide much-needed guidance on secondary liability for any digital product or service that connects one person to another (e.g., instant messaging, e-mail, and chat rooms) and – more important – for the next generation of network technologies, whatever they may be. The nation needs *Sony* version 2.0.

II. THE CLARITY OF THE STANDARDS FROM *SONY V. UNIVERSAL CITY STUDIOS* HAS DIMINISHED IN A DIGITALLY NETWORKED WORLD.

The digitization of information goods and the widespread availability of network technology have empowered the public in ways inconceivable when *Sony* was decided. Anyone with a computer and Internet connection can create, distribute, and use copyrighted content at almost no cost. This means we can each share with the world the products of our own creativity – a privilege previously reserved to the few – and can draw inspiration from a vaster universe of content than has ever before been

available. But it also means that copyright owners see their works routinely copied and traded online without any payment or authorization.

It is this file-sharing practice that gave rise to three controversial cases in the courts of appeals. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3247 (Oct. 8, 2004) (No. 04-480); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). In these cases, copyright owners sued providers of technologies that enabled end users to make and distribute unauthorized copies of copyrighted works. The central question in each case was how to apply *Sony*.

The *Sony* standard – whether the article was "capable of substantial noninfringing uses" – was dispositive in *Sony*, where the record showed a significant number of noninfringing uses to which the Betamax was actually put. 464 U.S. at 442-56. Moreover, the technology of the time could not enable the Betamax itself to distinguish between legitimate copying and infringement, and the manufacturer had only constructive knowledge of infringing activity and retained no control over the use of the product after the point of sale. *Id.* at 436-39. So the *Sony* Court confronted an either/or choice: allow sales of the Betamax and thus accept some degree of infringement, or bar them altogether and thus curtail significant legitimate uses.

Today, however, the technology has become more complicated, and so have the legal questions:

- The file-sharing systems at issue in the cases below are capable of noninfringing uses, but the uses to which they are predominantly put tend to be infringing. *Grokster*, 380 F.3d at 1161-62; *Aimster*, 334 F.3d at 652-53; *Napster*,

239 F.3d at 1020-21. When *Sony* asked whether a technology was "capable of substantial noninfringing uses," did it view as irrelevant the extent to which those uses actually occur?[2]

- The file-sharing systems vary considerably in the amount of ongoing contact they have with their users, and in the extent of control they exercise over a given individual's use. *Compare Aimster*, 334 F.3d at 646-47 (centralized server controlled by defendant), *and Napster*, 239 F.3d at 1011-12 (same), *with Grokster*, 380 F.3d at 1163 (decentralized server). In *Sony*, this Court mentioned the manufacturer's lack of continued contact with Betamax users. 464 U.S. at 437-38. What role do such contact and control play in the secondary liability determination?
- Those who provide the file-sharing systems may remain purposefully ignorant of the uses to which the systems are put, *e.g.*, *Aimster*, 334 F.3d at 650-51, or may gain actual knowledge of an act of infringement *ex post*, when it is too late to prevent it, *e.g.*, *Grokster*, 380 F.3d at 1162-63. *Sony* distinguished between generalized, constructive knowledge of infringement and actual knowledge of the acts of particular infringers. 464 U.S. at 439 & n.19. How do the specificity and timing of a defendant's knowledge of infringement impact the liability analysis?

The Seventh and Ninth Circuits are deeply divided on these important questions. In the Seventh Circuit's view,

[2] The *Sony* Court also held that the noninfringing uses must be "commercially significant," but declined to "give precise content" to that term because the noninfringing uses of the Betamax clearly satisfied any reasonable understanding of commercial significance. 464 U.S. at 442.

the critical issue is the "respective magnitudes" of the infringing and noninfringing uses. *Aimster*, 334 F.3d at 649-50. Prospective uses are relevant, but they must be "probable," not merely theoretical. *Id.* at 653. In contrast, the Ninth Circuit entirely disregards the amount of infringing use as long as the technology also has a noninfringing capability. *Grokster*, 380 F.3d at 1162.

Even if a technology has substantial infringing *and* noninfringing uses, the circuits disagree on how to apply *Sony*. The Ninth Circuit would end the inquiry there, with a finding of no liability, because it views the defendant's technology as static – fixed both in time and in design. In *Grokster*, for example, the notion that a defendant might alter its technology so as to minimize its infringing uses was relevant only to remedy, not liability. 380 F.3d at 1165-66; *see also Napster*, 239 F.3d at 1024 (noting that defendant's ability to control infringement is "cabined by the system's current architecture"). The Seventh Circuit takes a broader, more dynamic approach, which considers how the defendant designed the technology and whether it could have made (and could still make) design changes to eliminate or decrease the direct infringement. *Aimster*, 334 F.3d at 653 ("[I]f the infringing uses are substantial then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses.").

A related disagreement exists with regard to the importance of knowledge and timing. *Grokster* holds that a defendant's knowledge of infringement – even actual knowledge of specific infringing acts – leads to liability only if the defendant obtains the knowledge when it is in a position to stop the infringement. 380 F.3d at 1162. In contrast, *Aimster* views the level of knowledge and the issue of timing as factors to consider, 334 F.3d at 648-49, but its focus is the magnitude of infringing and

noninfringing uses and the cost of alternative, copyright-friendly designs, *id.* at 653-55.

These disagreements illustrate the need for a *Sony* update. The Betamax recorded programs blindly; it could not discern the copyright status of the television signals it captured. Today's technologies are more sophisticated, and their designers can more precisely predict and control their future uses. Many of the issues that divide the Seventh and Ninth Circuits – the kinds of use to which a device is put, the extent to which users can be monitored and controlled – are now or will soon be limited only by a designer's desires.

The Court can accordingly choose to leave the outcome to the vicissitudes of technology, *see, e.g.*, John Borland, *Labels, Microsoft in Talks on CD Copying*, CNET News.com, Sept. 17, 2004, *available at* 2004 WL 72207336 (reporting discussions about building music CD copy protection into next version of Windows operating system), with no assurance that the outcome will strike the correct balance between private incentive and public benefit and between authorial innovation and technological innovation. Or the Court can resolve the stalemate by clearly defining the legal rights and duties of both sets of innovators in a world of digital networks. In the past, this Court has not hesitated to clarify *Sony* when lower courts have misread its standards. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583-85 (1994) (rejecting "a presumption ostensibly culled from *Sony*" that every commercial use of copyrighted material is unfair). It should not hesitate now.

III. THE COURTS OF APPEALS HAVE TAKEN OPPOSING AND CONFUSING APPROACHES TO THE TWO DISCRETE THEORIES OF SECONDARY COPYRIGHT LIABILITY.

The courts of appeals not only disagree about the application of *Sony* to modern technology; they also confuse and conflate the two theories of secondary liability to which a *Sony* defense might be applicable: contributory liability and vicarious liability. These theories are critical to copyright law's ability to address widespread infringement in an efficient and fair manner, and this Court should therefore clarify their application.

Prior to the file-sharing cases, federal appellate courts had reached a consensus on these two discrete approaches to holding one party liable for the infringing conduct of another. Contributory liability required proof of the defendant's knowledge of the infringement and its material contribution thereto. *E.g.*, *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996); *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *Casella v. Morris*, 820 F.2d 362, 365 (11th Cir. 1987). Vicarious liability required proof of the defendant's right and ability to control the infringement as well as a direct financial interest therein. *E.g.*, *Fonovisa*, 76 F.3d at 262; *RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 781 (8th Cir. 1988); *Gershwin*, 443 F.2d at 1162. Now the file-sharing cases have produced inconsistencies in the application of these two theories.

One inconsistency results from a question *Sony* left open: does its "staple article of commerce" defense apply to contributory liability only, or to both contributory and vicarious liability? In *Napster*, the Ninth Circuit settled on the former interpretation, based on *Sony*'s explicit recognition that the only claim before it was one of contributory

liability. *Napster*, 239 F.3d at 1022-23 (citing *Sony*, 464 U.S. at 435 n.17).[3] In contrast, the *Aimster* court implied that the *Sony* defense would be available under both theories. 334 F.3d at 654-55. A clear answer to this question would give meaning to the central role that *Sony* plays in balancing the rights of copyright owners and technological innovators.

The more troubling inconsistency, however, is the conflation of the elements of contributory and vicarious liability into a baffling mishmash that calls for clarification by this Court. In *Napster*, for example, the Ninth Circuit held that "if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system" it is a *contributory* infringer. 239 F.3d at 1021. A defendant's ability to control and curtail infringement, however, has traditionally been an element of *vicarious* liability, not part of the contributory liability analysis. *See, e.g.*, *Fonovisa*, 76 F.3d at 262, 264; *Gershwin*, 443 F.2d at 1162.

The *Grokster* court compounded this confusion when it viewed the defendant's inability to control the infringement – again, traditionally a vicarious liability factor – as dispositive of the contributory infringement claim. 380 F.3d at 1162-64. The issue of lack of control infected the analysis of both contributory infringement elements, leaving the defendants without the requisite knowledge and without having materially contributed to the infringement. *Id.* To the Ninth Circuit, the operative "material contribution" was not the defendant's provision of file-sharing technology, but its

[3] Despite the *Sony* Court's recognition that vicarious liability was not among the issues presented, it continued to use the term in its analysis, *e.g.*, 464 U.S. at 437, 439, a factor which may be partly responsible for the current confusion among the courts of appeals.

failure to disable an infringing end user's access thereto. *Id.* at 1163-64.

Although the Seventh Circuit declined to resolve the vicarious liability claim in *Aimster*, 334 F.3d at 654-55, it would clearly approach the issue differently. For the Seventh Circuit, the question in the digital era is not whether a technology can eliminate infringing activity *ex post*, but to what extent an innovator must fashion its technology *ex ante* to take account of copyright concerns. *Id.* at 653 (discussing design changes in context of contributory liability), 654-55 (discussing design changes in context of vicarious liability). As discussed *supra* Part II, both a party's level of knowledge of and its right and ability to control infringing activity are a function of the design of its technology, and of how it has defined its legal relationship with end users. For example, Aimster altered the Napster file-sharing model by adding encryption features. *Id.* at 646. Was this willful blindness or a privacy enhancement? Grokster distinguished itself from Napster by decentralizing its file-indexing process. *Grokster*, 380 F.3d at 1163. Was this a purposeful evasion of legal responsibility or an innovative way to make the system more technologically robust?

It may be that answering these questions and responding to the other challenges of network technology require a recalibration of the elements of the two theories of secondary copyright liability. Perhaps publishers of copyrighted works should have to provide notice of suspected infringement or accommodate voluntary digital rights management technologies, so that technological innovators can more easily gain knowledge of and control infringing acts. Perhaps the burden to prophesy and preempt infringement should rest in the first instance with the innovators, so they cannot rely solely on the architecture of their systems to avoid liability. One thing is certain, however: the courts of appeals have not answered

these critical questions in a clear and consistent manner, and input from this Court is badly needed.

IV. THE SUPREME COURT SHOULD TAKE THE INITIATIVE TO RESOLVE THESE ISSUES.

The foregoing discussion has not cited a single federal statute. This is because secondary copyright liability has always been a creature of the courts. In fact, both contributory and vicarious infringement descended from the common law of torts – the former from the concept of enterprise liability, and the latter from the doctrine of *respondeat superior*. *Demetriades v. Kaufmann*, 690 F. Supp. 289, 292 (S.D.N.Y. 1988). This Court should continue the tradition of resolving these matters judicially and need not wait for a legislative solution.

Nearly one hundred years ago, in *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911), this Court upheld the concept of secondary copyright liability despite a lack of guidance from Congress. The defendant in *Kalem* had produced and sold films derived from the book *Ben Hur*, *id.* at 60-61, and the Court held the defendant liable for contributing to infringing exhibitions of an unauthorized dramatization, *id.* at 62-63. Although neither the applicable 1891 copyright statute nor its new 1909 revision provided for secondary liability, Justice Holmes proclaimed that such liability was "recognized in every part of the law." *Id.* at 63. *Kalem* merely recognized longstanding principles developed in the lower courts, *e.g.*, *Harper v. Shoppell*, 28 F. 613, 615 (C.C.S.D.N.Y. 1886) (holding defendant liable where it provided electrotype plate containing copyrighted work knowing of recipient's intent to use it to make illegal copies), and it paved the way for subsequent rulings of the same type, *e.g.*, *Herbert v. Shanley Co.*, 242 U.S. 591, 594-95 (1917) (holding hotel liable for hiring orchestra that engaged in unlicensed musical performance).

Sony itself recognized and embraced the judicial origins of secondary copyright liability. The *Sony* Court noted that "[t]he Copyright Act does not expressly render anyone liable for infringement committed by another" but held nonetheless that "[t]he absence of such express language . . . does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity." 464 U.S. at 434-35. Indeed, despite mentioning deference to Congress, *id.* at 430-31, *Sony* extended secondary liability's reach; the Court recognized that a copyright claim based on the manufacture of an article of commerce had "no precedent in the law of copyright," *id.* at 439, yet proceeded to articulate a standard that imposed liability, subject only to a new (and judicially created) defense, *id.* at 442.

Nor is *Sony* the only instance in which this Court has taken the initiative to reconcile copyright law with new technologies, rather than leaving the matter to Congress. In *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198-99 (1931), the Court ruled that a hotel that played the radio for its guests had engaged in an unauthorized public performance of the copyrighted music, notwithstanding the technological "novelty of the means used." In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395 (1968), the Court held that community antenna television systems did not "perform" television programs within the meaning of the 1909 Copyright Act, even as it recognized that the statute "was drafted long before the development of the electronic phenomena with which we deal here." *See also id.* at 395 ("We must read the statutory language of 60 years ago in the light of drastic technological change."). Likewise, in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), the Court stated that "[w]hen technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of [its] basic purpose [to stimulate artistic creativity

for the general public good]."[4] The Court's initiative has extended beyond statutory construction to its reading of the Constitution's Patent and Copyright Clause as well. *E.g.*, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56-58 (1884) (holding that photographs qualify as "Writing ," under Patent and Copyright Clause although "photography, as an art, was . . . unknown" to framers); *see also Goldstein v. California*, 412 U.S. 546, 561-62 (1973) ("[A]lthough the word 'writings' might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor" including "audio recordings of musical performances.").

The legislative history of the Copyright Act of 1976 indicates that Congress was happy with this judicial stewardship of secondary liability and endorsed its continuation. H.R. Rep. No. 94-1476, at 159-60 (1976) (recognizing that "a person who violates any of the exclusive rights of the copyright owner is an infringer, including persons who can be considered related or vicarious infringers" despite absence of statutory language to that effect); *see also id.* at 61 ("Use of the phrase 'to authorize' [in 17 U.S.C. § 106] is intended to avoid any questions as to the liability of contributory infringers."). Indeed, Congress enacted a safe harbor for secondary transmissions of television programs when it passed the 1976 Act, 17 U.S.C. § 111, and has since provided a second safe harbor for online service providers, *id.* § 512 – neither of which would be necessary if secondary liability were not a threat in the first place. *See also* 17 U.S.C. § 1201(c)(2) ("Nothing

[4] More generally, until 1976 it was judges – not legislators – who gave life to the doctrine of fair use, with courts "simply refus[ing] to read the statute literally" when a literal interpretation departed from the fair use principles that courts had articulated. *See Sony*, 464 U.S. at 447 n.29.

in this section shall enlarge or diminish vicarious or contributory liability for copyright infringement. . . . ").

In other intellectual property fields Congress has seen fit to legislate secondary liability, *e.g.*, 35 U.S.C. § 271 (imposing liability on anyone who actively induces patent infringement or qualifies as "contributory infringer"); 17 U.S.C. § 905(3) (prohibiting anyone from inducing or knowingly causing infringement of semiconductor designs), but it has left the courts in charge in copyright law. Its own attempts to address secondary copyright liability have been infrequent and abortive. *E.g.*, S. 2441, 101st Cong. (1990) (failed attempt to impose liability on manufacturers of equipment whose "primary use" is to evade anticopying motion picture technology); H.R. 384, 99th Cong. (1985) (failed attempt to exclude from liability private noncommercial home video recording); S. 31, 98th Cong. (1983) (same). The most recent and relevant example is the Inducing Infringement of Copyrights Act, S. 2560, 108th Cong. (2004), which would establish a new theory of secondary copyright liability – without necessarily resolving confusion about the existing theories. *See id.* § 2 ("Nothing in this subsection shall enlarge or diminish the doctrines of vicarious and contributory liability. . . . "). Despite lengthy negotiations, the current Congress is unlikely to take any further action on the Act, *see P2P Secondary Liability Remains Issue Before Congress, Courts*, Warren's Consumer Elec. Daily, Oct. 21, 2004, *available at* 2004 WL 64365095 (reporting negotiators' view that lame-duck Congress will not address bill), and history provides no reason to count on a different result next session. Waiting for a legislative solution that may never come carries its own costs for authorial and technological innovators.

Congress has never played a significant part in defining the liability of secondary infringers, either as a general matter or with regard to the manufacture and sale

of new technologies. This Court should continue the tradition of resolving these issues judicially.

CONCLUSION

The Seventh and Ninth Circuits are deeply divided on important legal issues that affect innovation in two of the nation's leading industries. The Court should exercise the same initiative here that it displayed in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), by clarifying the application of *Sony* to network technologies and establishing consistent standards of secondary copyright liability. For the foregoing reasons, the petition for the writ of certiorari should be granted.

Respectfully submitted,

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